

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

February 25, 2015

Agenda ID #13752
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 11-04-013:

This is the proposed decision of Administrative Law Judge Seaneen M. Wilson. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's March 26, 2015, Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ DAVID M. GAMSON

David M. Gamson

Chief Administrative Law Judge

DMG;jt2

Attachment

Decision **PROPOSED DECISION OF Chief ALJ** (Mailed 2/25/2015)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of James L. and Marianne S. Orvis to sell, and Aspen Forest Investment Co., LLC, to buy, Five Thousand (5,000) Shares of the Common Stock of the water system known as Lake Alpine Water Company, Inc. (U148WTD) Located in Alpine County, California.

Application 11-04-013
(Filed April 15, 2011)

**DECISION DENYING MOTION TO ACCEPT APPLICATION FOR
REHEARING OF DECISION 13-03-007****1. Summary**

This decision denies the Motion for Reconsideration of Rejection of the Application for Rehearing of Decision 13-03-007, filed by Ratepayers of Lake Alpine Water Company's and Bruce and Paula Orvis.

2. Background

Lake Alpine Water Company, Inc. (LAWC) is a Class D water utility subject to the jurisdiction of this Commission. On February 11, 2003, Aspen Forest Investment Co., LLC (Aspen) purchased 5,000 shares of LAWC's common stock, which represents 50 percent of LAWC's total common stock, from James L. and Marianne S. Orvis (J&M Orvis). J&M Orvis and Aspen did not file an application for authority for the February 2003 transaction, believing that they were not required to do so pursuant to Sections 851 to 854 of the Public Utilities

Code.¹ However, on April 15, 2011, J&M Orvis and Aspen filed Application (A.) 11-04-013, requesting that the transfer of stock be granted on a *nunc pro tunc* basis. Ratepayers of LAWC and Bruce and Paula Orvis (collectively RLAWC/Orvises) filed protests, asserting that the 2003 transaction was null and void for failing to obtain Commission approval and that the transaction was against the public interest.

On March 29, 2013, the Commission issued Decision (D.) 13-03-007, Granting Conditional Authority for J&M Orvis to Sell and Aspen Forest Investment Co., LLC to Buy 5,000 Shares of Common Stock of the LAWC. In D.13-03-007, the Commission ruled that A.11-04-013 was subject to Section 854(a), which is under Article 6 of Chapter 4.

On April 29, 2013, RLAWC/Orvises served an Application for Rehearing of D.13 03-007 on the parties and submitted the Application for Rehearing for filing at our Docket Office. Our Legal Division advised RLAWC/Orvises by a letter dated May 10, 2013, that their Application for Rehearing had been rejected as untimely. Section 1731(b)(1) requires that an Application for Rehearing be filed within 30 days after the date of a Commission order issuance or within 10-days after the date of issuance in the case of an order issued pursuant to either Article 5 or Article 6 of Chapter 4.

On June 12, 2013, RLAWC/Orvises filed their Motion for Reconsideration of Rejection of the Application for Rehearing of Decision 13-03-007.

We do not usually accept motions to accept rehearing applications that have been rejected for filing. However, we deviate from that protocol here

¹ Subsequent section references are to the California Public Utilities Code, unless otherwise noted.

because RLAWC/Orvises challenge the legality of the rejection, and we believe that issuing a decision on this motion would be helpful to RLAWC/Orvises in understanding the correctness of the rejection.

3. Discussion

3.1. The Commission's Application of Section 1731(b)(1) of the Public Utilities Code Section was Lawful.

RLAWC/Orvises argue that the rejection of their Application for Rehearing of D.13-03-007 as untimely was wrong. RLAWC/Orvises assert that their rehearing application was not subject to the 10-day limitation in Section 1731(b)(1). Their argument relies on the plain language and the legislative history of Section 1731(b)(1).

First, RLAWC/Orvises assert that the plain language of the statute supports the interpretation that D.13-03-007 is not subject to the 10-day limit for rehearing. In their Motion they argue that “the Legislature did not include mergers, acquisition or control of public utilities within the express types of transactions subject to a ten-day limit for appeal, [so] . . . the Legislature intended to exclude such transactions.” (Motion at 3.) RLAWC/Orvises assert that the 10-day rule does not apply to Articles 5 and 6 comprehensively; rather, the 10-day rule only covers security transactions and the transfer or encumbrance of utility property. Thus, they assert that any application for rehearing of D.13-03-007 is not subject to the 10-day rule because the decision was issued pursuant to Section 854, which relates solely to transfers of control of a public utility.

In their Reply, RLAWC/Orvises contradict their argument and further restrict their interpretation of Section 1731(b)(1). In their Motion, RLAWC/Orvises argue that Commission orders related to Section 852 of

Article 6, relating to securities transactions between public utilities, “fall squarely within the Section 1731(b) 10-day limit for appeals . . .” (Motion at 3.) In their Reply, however, RLAWC/Orvises assert that the 10-day rule only applies to securities transactions that fall under Article 5, not Article 6.

Section 1731(b)(1) of the Public Utility Code states, in pertinent part:

No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance or within 10 days after the date of issuance in the case of an order issued pursuant to either Article 5 (commencing with Section 816) or Article 6 (commencing with Section 851) of Chapter 4 relating to security transactions and the transfer or encumbrance of utility property.

The Commission’s Rules of Practice and Procedure reflect this statutory requirement in Rule 16.1(a), which requires that applications for rehearing of Commission decisions relating to security transactions and transfers or encumbrances of utility property be filed within ten days of mailing the decision.

We reject RLAWC/Orvises’ narrow reading of Section 1731(b)(1). If the Legislature intended to cover only securities transactions under Article 5 and only the transfers and encumbrances of utility property under Article 6, it would have done so explicitly. Rather, the Legislature chose to use broad language to comprehensively cover both Articles 5 and 6. Moreover, Articles 5 and 6 do not cover discrete topics. Articles 5 and 6 both deal with securities transactions and transfers and encumbrances of utility property. For example, Sections 816 and 816.5 in Article 5 deal with transfers and encumbrances of utility property and Section 852 in Article 6 deals with securities transactions, as RLAWC/Orvises acknowledge in their Motion. (Motion at 3.) Conversely, not every section

within Article 5 deals with securities transactions and not every section in Article 6 deals with the transfers and encumbrances of utility property. If we were to accept RLAWC/Orvises' narrow interpretation, this would exclude a number of sections in both Articles 5 and 6, skewing the language and meaning of Section 1731(b)(1).

We have previously addressed the issue of whether Section 854 falls under the 10-day limitation under Section 1731(b)(1). In D.97-09-121 (*In the Matter of the Joint Application of GTE Corporation and Contel Corporation* [D.97-09-121] 75 Cal.P.U.C.2d 804), The Utility Reform Network (TURN) filed an Application for Rehearing of a decision issued pursuant to Section 854. The Commission rejected TURN's Application as untimely because it was subject to the 10-day limitation under Section 1731(b)(1). The Commission reasoned that it "reached a decision regarding the allocation of economic benefits pursuant to Section 854 of the Public Utilities Code. Accordingly both Public Utilities Code Section 1731 and . . . the Commission's Rules of Practice and Procedure mandate that any application for rehearing . . . was to have been filed no later than 10 days after the date of mailing of the Commission decision." (D.97-09-121 at 3.) Similarly here, D.13-03-007 was issued pursuant to Section 854 and is therefore subject to the 10-day rule. Commission precedent holds that a decision issued pursuant to Section 854 is subject to the 10-day rule under Section 1731(b)(1).²

² See, e.g., D. 07-12-057 (denying rehearing because "Sections 851 to 854 govern the transfer of control at issue in this proceeding These statutory provisions fall within Article 6 of the California Public Utilities Act. As such, rehearing applicants were required to file their rehearing application within 10 days"); D.07-11-050 (denying rehearing because the decision was determined pursuant to "[b]oth Sections 852 and 854 [which] fall within Article 6 of the California Public Utilities Act. Consistent with Section 1731(b), CFC was required to file its application for rehearing within 10 days"); D.01-05-063 (denying rehearing because the decision "relates to the issuance of bonds, i.e. security transactions . . . [and thus] requires the degree of

Footnote continued on next page

Even if the Commission were to adopt RLAWC/Orvises' restrictive reading of the statute's plain language, it is difficult to dispute the fact that the sale of 5,000 shares of common stock is a securities transaction.³

RLAWC/Orvises focus only on the change in control of LAWC. They would have us completely ignore the essential element of the sale of common stock in order to effectuate that change in control. Section 854 may relate to securities exchanges because securities exchanges are often necessary to "merge, acquire, or control either directly or indirectly any public utility"

(§ 854(a).) In fact, D.13-03-007 is titled, "Decision Granting Conditional Authority for J&M Orvis to **Sell** and Aspen Forest to **Buy 5,000 Shares of Common Stock of the LAWC**" (emphasis added). This sale of common stock is a securities transaction.

Second, RLAWC/Orvises argue that Section 854 is not included in the 10-day rule based on the legislative history of Section 1731. The 1976 amendment to Section 1731 required an application for rehearing to be filed "before the 10th day after the date of issuance in the case of an order authorizing the issuance of securities." ⁴ RLAWC/Orvises argue that this language did not apply to Section 854 because it "does not relate to the authorization of the issuance of securities." (Motion at 5.)

certainty and level of urgency specified in Section 1731 and is subject to the 10-day deadline for filing rehearing applications"); D.92-10-057 (denying rehearing because "[t]he reasonable reading of this statute is that the ten-day rule applies to cases involving either article 5 or article 6").

³ See Cal. Corp. Code § 25019.

⁴ Stats. 1976, ch. 1064.

Again, we disagree with this characterization. Moreover, even if RLAWC/Orvises' argument had merit, it is of no concern in the present day. The scope of the 10-day rule has been expanded numerous times since 1976 and the language that RLAWC/Orvises rely on has been absent from the statute for nearly four decades.

RLAWC/Orvises further argue that "[i]n 1977, the [L]egislature amended Section 1731 again, adding within the ten-day filing limit for appeals 'the transfer or encumbrance of utility property[,]'" which does not encompass Section 854. (Motion at 5). This interpretation is meritless and an over simplification of the 1977 amendment. In 1977, the Legislature did more than just expand the 10-day rule to include the transfer or encumbrance of utility property – the amendment expanded the rule to include all of Article 5 and Article 6 by replacing the phrase "authorizing the issuance of securities" with "issued pursuant [] to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transactions and the transfer or encumbrance of utility property."⁵ In 1993, this text was clarified by adding the word "either" before "Article 5" and substituted the word "or" for "and" before "Article 6."⁶ This amendment clarified the intent of the Legislature that the 10-day rule applied to decisions issued under *either* Article 5 or Article 6. Article 6 includes Section 854. Accordingly, we have issued numerous decisions based on the interpretation that any Commission decision issued pursuant to any section of either Article 5 or Article 6 of Chapter 4 is subject to the 10-day rule set forth in Section 1731(b)(1).

⁵ Stats. 1977, ch. 1091. This language is similar, but not identical, to the current statute.

⁶ Stats. 1993, ch. 908.

**3.2. The 10-day Limitation in Section 1731(b)(1)
Applies to the Entire Order**

RLAWC/Orvises argue that the Administrative Law Judge's (ALJ) ruling regarding the conflict of interest is not related to Section 854, and therefore, should not be subject to the 10-day rule under Section 1731(b)(1). We disagree. Ordering Paragraph 6 of D.13-03-007 affirmed all assigned Commissioner and ALJ rulings in this proceeding. (D.13-03-007, at 41, [Ordering Paragraph 6].) This order is part of D.13-03-007 which was issued pursuant to Section 854. Thus, an application for rehearing on any aspect of the decision must have been filed within the 10-day limitation for rehearing. We do not handle applications for rehearing on an issue by issue basis. If we were to allow parties to file separate applications for rehearing based on different issues, this would create a heavy burden on our administrative system.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Opening comments were filed on RLAWC/Orvises and LAWC on March 17, 2015, and reply comments were filed on March 24, 2015 by LAWC.

5. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ for the proceeding. The Chief ALJ is the proponent of the proposed decision on RLAWC/Orvises' instant motion. (*See* Rule 16.1(e).)

Finding of Fact

1. RLAWC/Orvises submitted for filing an Application for Rehearing of D.13-03-007 on April 29, 2013, after the 10-day deadline set forth in Section 1731(b)(1).

Conclusions of Law

1. A Commission decision issued pursuant to Section 854 of the California Public Utilities Code is subject to the 10-day limitation set forth in Section 1731(b)(1).
2. The 10-day limitation for rehearing in Section 1731(b)(1) applies to the entire order.

O R D E R

IT IS ORDERED that the Ratepayers of Lake Alpine Water Company and Bruce and Paula Orvises' motion to reconsider its application for rehearing of Decision 13-03-007 as timely filed is denied.

This order is effective today.

Dated _____, at San Francisco, California.